

**Milton Planning & Zoning Commission Meeting**  
**Milton Library**  
**Tuesday, September 29, 2009**  
**7:00 p.m.**

1. Virginia Weeks called the meeting called to order at 7:00 p.m.
2. Roll call of Members:

Ted Kanakos  
Al Perkins  
Ed Kost  
Virginia Weeks  
Gene Steele  
Dick Grieg  
Louise Frey (Absent)

3. Changes, additions, corrections or deletions to the Agenda

Virginia Weeks: Are there any additions or corrections to the Agenda? No? I would like to add something. I would like not just a discussion on process and procedures, I would like to have a little bit more discussion; I would like Debbie to explain to us the Comp Plan and I would like Robin to let us know what's happening with the school parking lot, that he went down and inspected; that they have not fulfilled their requirements. Will somebody give me a motion to...

Debbie Pfiel: I'll mention about the Comp Plan, but that's scheduled for October; we have that [couldn't hear the balance of what was said].

Virginia Weeks: I want to discuss the Comp Plan.

Al Perkins: I make a motion that we discuss the Comp Plan, as well as the school parking lot.

Dick Grieg: I second.

Virginia Weeks: All in favor say "Aye". Any opposed. Vote carries unanimously.

4. Approval of the Agenda

Virginia Weeks: May I have a motion to approve the Agenda?

Ted Kanakos: I make a motion to approve the agenda.

Al Perkins: I second the motion

Virginia Weeks: Voice vote, all in favor "aye". Opposed. There being none, it carries unanimously.

5. Approval of Minutes from August 18, 2009

Virginia Weeks: Any changes, additions, corrections or deletions to the Minutes of August 18, 2009.

Gene Steele: I make a motion that we accept the Minutes of August 18, 2009, as presented.

Ted Kanakos: Second.

Virginia Weeks: Voice vote, all in favor say "Aye". All opposed. Motion carried unanimously.

## 6. New Business

- Final Site Plan Approval Dog Fish Properties

The Applicant, Dog Fish Properties is requesting Final Site Plan Approval for the installation of a process wastewater storage tank at 6 The Center, further identified by Sussex County Tax Map and Parcel Number 2-35-20.11-52.01 and 52.06. Do the Applicants have anything they would like to say or address at this point?

Robert Simpkins, Engineer, Becker Morgan Group: Since last coming before the Commission, we do have Final Approval from the Department of Natural Resources for the tank; we also have gone back to the Soil Conservation Service with the change of the pond slopes as your Engineer recommended; we adjusted the drawings, went back through them. They had already approved it, last March; but we went back and got new approvals. Those are the drawings that were submitted to the Town. For the most part, that's the update.

Virginia Weeks: I have a couple of questions. I reviewed the minutes of the Preliminary Hearing. The grade was changed to 3 to 1, rather than 2 to 1 around the pond, the stormwater pond?

Robert Simpkins: That's correct.

Virginia Weeks: The other thing, Mr. Kerr, who unfortunately, can't be here, asked that there be some sort of language about the decoupling about the decoupling of the six tanks from the large tank, at one point.

Robert Simpkins: That's correct and that was part of what was approved by Department of Natural Resources, essentially as of right now the six small tanks and the large tank are connected; but the height of water in the large tank is limited by the small tanks; and, therefore, the total storage right now is going to only be like 54,000; whereas, when they want to put a pump in there to change the pumps, pilot pump, so that the large pump can be full to capacity, the small tanks will be taken out.

Virginia Weeks: Right and at some point they operate separately?

Robert Simpkins: No they wouldn't be operating simultaneously; I'll put it that way. In other words, once the large tank is fully utilized, the small tanks would not be in operation. Any change would require change in the permit with DNREC; but for the small tanks and the large tanks to be fully utilized, we would have to address the containment and there are some other issues that DNREC would want us to address. So right now the plan is with the six small

tanks; the large tank being used partially at this point; the volume is there that DNREC's approved; and ultimately the plan would be to take the six small tanks out; use the large tank fully and the containment pond would not have to be changed; if that makes sense to you. It has to do with the total volume stored.

Virginia Weeks: Yes, Mr. Kerr asked said he would prefer to see some notes detailing the decoupling of the large tank from the six small tanks and that they will operate as an independent network from the larger 67,000 gallon tank and just additional notes on the thing that it will be operated as two individual systems and not interconnected. Was that put on the Final Site Plan?

Robert Simpkins: That is correct and Mr. Kerr has reviewed that and he's reviewed the notes.

Virginia Weeks: Did you supply Mr. Kerr with the Operation of Maintenance Procedure Manual?

Robert Simpkins: Yes we did.

Virginia Weeks: Thank you. The only thing left is Mr. Kerr's concern about odor.

Ted Kanakos: Just a question. Mr. Kerr states a portion of the containment pond is shown within the flood plain, but above the flood elevation. Could you explain this to me and how this would affect if there was excessive flooding? What happens when that containment pond fills up? Where does that go; any way of draining it? Is there a mechanical way?

Robert Simpkins: Yes, the permit requirements are to have clean up within 24 hours; it is actually 24 or less. That is where they would use Clean Delaware; they would have to come in; pump it out; and that would be transferred to their field operations. As far as the flood plain, if you look on the FEMA flood maps, there's an old line where the flood plain exists, both Bob Kerr and we agreed that the existing grades that are there now, are above the flood elevation. The flood elevation is 9; the grades that are out there are 17+; and all the work that we're proposing out there, most of it is a cut, moving around dirt; we're not imposing on the flood plain; we're not changing the flood elevation and as far as any kind of analytical analysis of whether the work we're doing is going to change the flood plain; Mr. Kerr and I both agree that it's a moot point; it's intuitively obvious; we're not adjusting the flood plain.

Mary Schrider-Fox: I have taken a look at the Town's Flood Ordinance, per Mr. Kerr's suggestion, and I do not find that there is any problem with this proposal under the Flood Ordinance. The Flood Ordinance does trigger some additional requirements for different types of structures or changes made in a flood plain area and none of those are triggered by this particular proposal for the reasons that have already been stated and I agree with Mr. Kerr that because the flood elevation is actually above the flood plain, I don't think we have a problem.

Virginia Weeks: Ted, you're fine?

Ted Kanakos: Yes.

Virginia Weeks: Okay. Do you want to address the second portion of that piece?

Ted Kanakos: Okay, the second item concerns the potential for odor from that wastewater system. The new tank may result in on-site storage of wastewater for greater lengths of time. In response to our question regarding odor control, the owner's engineer responded that none was required. It is recommended that a note be considered as follows: "The owner or operator shall be responsible for adding odor control equipment to the wastewater tanks or containment pond should the Town receive odor complaints from nearby residents and the Town determines that the odors are from the wastewater storage tanks or containment pond."

Robert Simpkins: As far as the odor control that is addressed in the DNREC Permit, that if the odors become a nuisance the Department of Natural Resources oversees that and actually, nothing could be added to the system, unless DNREC approves it anyway; and it's already addressed in terms of that.

Virginia Weeks: Well Mr. Kerr obviously felt that it needed further protection.

Mark Dunkle: I've been before you before and I'm the attorney for the Applicant with Parkowski, Guerke and Swayze, 116 West Water Street. Just a couple of points, because the letter you're reading from Mr. Kerr actually directs the questions to the Town Attorney; they're both legal questions. It mentioned about the flood and also this comment about odors. I wanted to address it. Part of his recap is not complete in reflecting from the Minutes what the discussion was about odor. He does mention that the owners engineer said that there won't be an odor; it won't be a problem. But the Applicant went on further to state in response to a question from Mr. Kerr about odor; the Applicant's engineer stated it will be addressed in the DNREC Permit. That seemed to be the acceptable response to the question. Your minutes, I don't have page numbers, but the question from Mr. Kerr was to you "you may wish to discuss and ask what provisions for odor control are provided?" He goes on to discuss that.

Virginia Weeks: What are the provisions?

Mark Dunkle: That's right and Mr. Moore of Becker Morgan Group responds on the next page that the DNREC Permit in it will have an Operation of Maintenance Procedure Manual as part of that and that we will provide that in the Final Application. Ordinarily, we wouldn't get the DNREC Permit before we got your approval. It's very difficult to get that Permit, but they did obtain it; and I supplied to your attorney a copy of the DNREC Permit and the DNREC Permit provides a Special Condition regarding odor; and that Special Condition is that if the odors become to the level of a public nuisance then DNREC will demand that this Permittee take measures to reduce those odor levels. So in your Preliminary Approval, odor was not mentioned as a condition, it was suggested by Mr. Kerr as a question and we answered that question to explain that it will be addressed in the DNREC Permit.

Virginia Weeks: Odor was brought up many times, as you've been testifying. We kept saying they won't be anymore odor; there's an odor now and if we add to it; it won't smell more. I personally asked the questions about odor.

Mark Dunkle: Correct. That's correct. There's no recommended condition regarding odor, other than what we proposed in our testimony that it would be addressed by DNREC and we think we followed through with that promise; it's addressed specifically in the DNREC Permit. I also took a look at your Zoning Code for this Zone and, of course, it allows manufacturing to have odors. It has allowed smoke to a certain degree; but your Code does place a limit on odors; they can not be noxious or odors to the level of a nuisance. That's really the standard. The standard that was suggested by Mr. Kerr in his letter, is unqualified and just says any odor; well as you know there was a lot of testimony that in the brewery process you are going to smell the odor of beer brewery; you have to because that's part of the plant. So, no odor can't be a restriction or else you wouldn't have a plant. So I guess, Ms. Weeks, what I'm trying to respond to is this current plan that we've submitted, we believe meets all of the requirements that were requested by this Commission at Preliminary Plan Approval; all the requirements; I think we've got a letter from this file that confirms that too and Mr. Kerr. There is now a new condition proposed by Mr. Kerr in his most recent letter, in September, asking that this extra note be added about if there is a complaint about odor, if someone responds, and that's really not part of the Approval.

Virginia Weeks: I reread the Minute and this discussion by odor ended with the fact that you were going to get DNREC's Permit and it will have an Operation of Maintenance Procedure Manual, as part of that. That you were going to get it to Bob as part of his Final Site Plan. I asked Mr. Simpkins and he said yes, that was given to Bob.

Mark Dunkle: Correct.

Virginia Weeks: Bob, I trust has reviewed that, but yet still must feel that we need to put this in and so I'm at a quandary as to whether Bob found those sufficient, because there is no word from Bob that he found what the Maintenance Procedure Manual said as sufficient to the question of odor.

Mary Schrider-Fox: With respect to this issue of placing an additional condition right now that would require odor control equipment to the wastewater storage tanks or containment pond, should the Town receive odor complaints from nearby residents and the Town determines that the odors are from the wastewater storage tanks or containment pond. From a legal perspective, that particular condition was not stated as a condition at the Preliminary Site Plan Approval stage. Now, I do agree there was a discussion about odor and I reviewed the minutes, as well, and I remember the exchange Ms. Weeks that you were talking about where questions about odor came up and Mr. Benz responded about whether or not there was going to be additional odor; what would happen if there was a discharge into that containment pond and how the DNREC Permit would come into play. So, yes, that discussion did take place. However, when the Preliminary Approval was given, although you incorporated Bob's concerns and questions as the Town Engineer, the

idea that that exact kind of condition would be placed; was not said to specifically or talked about with any specificity. From a legal perspective, that's important because all conditions are to be placed at the Preliminary Approval Stage and then we get to Final and in order to impose a new condition now; we can't do that under the Town's Ordinances. The only time that you can do that is if at this stage you say there has been a substantial change in conditions that makes this Planning Commission think, with respect to a particular issue, that you have to go back to the Preliminary Site Plan Stage and we're going to talk about new conditions. So that something must have happened between the Preliminary Approval and now that was a substantial change in condition and I don't think we have that.

Virginia Weeks: I can tell you what happened. It said that if we are lucky to get approval of Preliminary, we are actually going to be able to get DNREC's Permit and it will have an Operation of Maintenance Procedure Manual as part of that and Bob will provide that to you as part of the Final, so you'll see what they're actually requiring. It was left that Bob has to be satisfied by what the Maintenance Procedures were and what the Maintenance Manual said. I'm interpreting that if Bob was satisfied, we wouldn't have this suggestion. They were unable to give it to us; we left it that if they gave the Maintenance thing and Bob was satisfied, fine; but I have no idea if Bob was satisfied, since he's suggesting this requirement.

Mary Schrider-Fox: In this letter, we suggested that these two ideas about the flood plain and about this additional requirement be reviewed by the Town Attorney and that's me; and I've reviewed it and it's my opinion that based on the record, I think that we could be exposed, legally, if we added this requirement at stage on the Final Site Plan. Ultimately the decision of whether or not to do that belongs to the Planning & Zoning Commission. I can only give you what my legal opinion is based on the record, the Preliminary Approval and what we have now. Having said that, just a couple of practical issues that you might want to consider and that is whenever we're talking about placing conditions on an Approval, ultimately behind all of this power to approve zoning and to place conditions on an approval, we have to consider the general health, safety and welfare of the community and so if we place a condition on the approval, presumably it's because we're trying to protect the general health, safety and welfare of the community. I only mention that because at least in this particular instance, I'm not so sure that all is lost with this odor issue; you do have a DNREC Permit in place and I've taken a look at that and it's pretty lengthy and there are pretty strict requirements about what they have to do to operate properly under this DNREC Permit and if they don't the heavy hand of DNREC comes down and DNREC is the authority that specializes in these types of issues because they are the ones that deals with them. One of the other things and Mr. Dunkle has communicated with me about this earlier and he pointed out that any neighbor, anywhere in Town, who does have a concern or a problem with an odor that's being generated from one of their neighbors; does have the ability to pursue the neighbor that's creating that noxious odor in the Court of

Chancery to get an injunction; so there are remedies that are available to people; even in general and I'm just saying that, if that adds a level of comfort to anybody. The other thing as I was reviewing things for tonight, the Town has, in its Morals and Conduct section of the Town Code, a procedure for any type of nuisance that a town's member can follow whether it's an odor, a light, some other kind of emission from a neighboring property, so there are some mechanisms already in place and I think the most important one probably, in this instance, is the DNREC Permit which ultimately will prevail and kind of control their lives with their storage tank probably anyway.

Virginia Weeks: My one question is, because I don't know DNREC, and Bob isn't here. If we have complaints, does DNREC turn around and say well it's a brewery; of course it has that odor, that's not noxious for a brewery. That's ordinary for a brewery.

Mary Schrider-Fox: Well I certainly think that at some point that is at some point that is part of DNREC's response; because they have to take each situation as they find it and consider what a permitted use is. Odor is permitted to be generated from this brewery, that is a natural side affect for this type of use and the law understands that. In the event that we were litigating this as a nuisance action in Court that would certainly be part of what the Court of Chancery would think about too; so I can not speak for DNREC, because I don't represent DNREC.

Virginia Weeks: I just want to know if we have a definition of nuisance. Debbie, I'm sorry we're annoying you.

Debbie Pfiel: I can make that \_\_\_\_ because I'm just thinking.

Virginia Weeks: I come from another part of the world where it is very difficult to prove nuisance.

Mary Schrider-Fox: And your part of the world is not unlike every other part of the world, including Delaware. In fact, I just recently litigated a case, it wasn't about odor, but it was about a different type of nuisance; and they are very fact specific; the experts in Delaware on what constitutes a nuisance is the Court of Chancery and then the second expert, I would say, in a lot of different types of cases, when it comes to emissions, odors, smoke, soot would be DNREC because they are the ones that deal with it and have permits where they enforce those things or decide what's too much; when have you gone too far. It is a difficult business for the Town to get involved in, of trying to determine what a nuisance is and what isn't. What comes into play is what's reasonable for the use that's at issue, so what would be reasonable for a brewery and then whether or not the people that are complaining that the odor is too much or the soot is too much or whatever might be at issue; whether or not they are of reasonable sensibilities or whether or not they have a peculiar condition that makes them ultrasensitive. It's a difficult issue period.

Virginia Weeks: It's a difficult issue for us because what happens is that we are going to have to encumber people who might have a real problem with some odor if it does become a nuisance with legal bills and lawyers and experts.

Ted Kanakos: I have a question. In response to our question regarding odor control, the owners engineer responded that none was required. Now I assume that Bob Kerr is saying it is recommended that a note be considered as follows: the owner or operator shall be responsible for adding odor control equipment to the wastewater storage tank or containment pond should the Town receive odor complaints from nearby residents and the Town determines that the odors are from wastewater storage tanks or containment pond. Now as I understand it, since this was not put in the Preliminary, you can't add it to the Final; this little note that he is asking.

Virginia Weeks: But it wasn't put in the Preliminary, because they didn't have the information for him; and it was contingent upon his receiving the Maintenance Procedure Manual and being satisfied with it.

Ted Kanakos: See my concern with also is that a number of people have complained about different things about the brewery, especially noise. Now, if we let this go through the way it is; the only recourse that the residents would have is really not to come to the Town, but to come to DNREC and hire a lawyer, for whatever reason. In other words, this, as it stands now the Town, although determines that odors are from the wastewater, blah, blah, blah; they really can't be required to do anything and people will have to go to DNREC as a Homeowner's Association or something and go to that stage.

Robert Simpkins: You can go to DNREC as an individual. You talk about hiring a lawyer, as a Homeowner's Association, as a group...

Ted Kanakos: If we don't do anything with regards to insuring or guaranteeing that the Town has some say, their only recourse; they should have recourse; they should have some recourse; they could either come to the Town and/or to DNREC. As it stands now, they can only go to DNREC if everything goes through as you're requesting.

Mark Dunkle: I think our problem is the exact problem Ms. Weeks identified. There's no standard for noxious odor. In Mr. Kerr's suggestion, there's no standard whatsoever. It's I smell something. I think you probably all would agree that couldn't possibly work. That's totally subjective. I smell something. Well, what's the standard? I think the best that we can suggest is DNREC is the agency that actually has smell meters and response to smell complaints and has a standard in this permit that says it will not rise to the level of nuisance. We would certainly number one, be obligated to report to you any complaints that we receive from DNREC. Number two, if we violate the DNREC Permit, I think it goes without saying, but it could be said in your Final Approval, then we are in violation of your Approval.

Ted Kanakos: First, if you report to us, we're totally harmless; we can't do anything.

Mark Dunkle: That's what I just said is, if we were found in violation of by DNREC, then we're in violation of your Approval, so you do have an enforcement mechanism if we violate this Permit with DNREC.

Virginia Weeks: Only if you're in violation of DNREC.



Mark Dunkle: Correct. And that's the only odor standard that there is, other than what's in your Code, which is the same as DNREC's, which is there can't be a noxious odor.

Ted Kanakos: At least you don't have to come to us; you can't come to us; for any cure.

Virginia Weeks: You can't come to the Town for any recourse.

Mark Dunkle: Well I tried to say that you do have recourse, because this odor permit is controlled by your approval; the DNREC Permit is part of your approval; but this company can't operate if a neighbor doesn't like the odor from the company. That's not a tight enough standard; just as you mentioned; there has to be a standard.

Ted Kanakos: A number of neighbors, 75 neighbors?

Mark Dunkle: It doesn't matter, that's not the standard of the smell.

Virginia Weeks: I don't feel competent at this point without some counseling from our engineer on what the DNREC standard is and what is the cut-off and how it is measured. You say they have a smell-o-meter; I don't know what a smell-o-meter is. I would need some counseling from our engineer on that.

Nick Benz, Dog Fish Head Craft Brewery: We're not talking about something new here. The odors that are being contemplated here are the same odors that have been generated from this facility since June of 2003 since the month we moved in that facility. We have always had wastewater storage facilities from the moment we got kicked off the Town system; we've handled 100% of every drop of liquid that leaves that facility, at our expense; and we're still dealing with that issue to this day; still not on the Town system because of that; there is no change in condition here; it's a natural growth process to what we're doing. There are two issues related to odor: on the retention pond and from the tanks. The retention pond, there is absolutely no planned scenario where the retention ponds where the retention ponds are even used; they are there in case of a failure of a system. In the case of a failure of a system, that retention pond must be cleaned in a very short period of time, per the Code of DNREC; there are no odor issues; there's not time for odor to develop; it overflows into a thing; you empty it; it's immediately gone.

Ted Kanakos: And there's odor in the containment tank itself. Is that a closed tank?

Nick Benz: It's a closed tank, with closed pipes and closed valves. You hook up a hose to it and it goes into a closed transportation vehicle, which then goes to farmland and applies it. There's no nuisance code governing manure spreading on the fields we all smell this time of the year. Half of us would agree that's a nuisance, or think it's a nuisance. Where do you draw the line?

Ted Kanakos: Where I drive or ride my bike through the brewery, I can smell the normal brewing.

Virginia Weeks: That's from the brew house, right?

Nick Benz: That's the brewing process, that yeasty bread smell.

Ted Kanakos: We're talking about a whole separate group of odors, in other words is the odor different in the containment tanks?

Nick Benz: No, it's diluted beer. It has a little bit of detergent.

Ted Kanakos: Is it the same odor that you would smell in the... which is normally dissipating into the air in the brewing process when you go by you can smell that it's a brewery; whether it smells like croissants or oatmeal or whatever. Now, the water in the containment tank, does that generate a specifically different odor? Is it stronger, is it more vinegary?

Nick Benz: The brewing process in theory is more diluted; the brewing process is a cooking process, so much like baking bread in your kitchen, it fills your home with that smell of bread. If you leave the bread sit on your counter top and the next day the whole home doesn't smell, but if you get close to that loaf, you can smell bread. It's the same thing; we're not in the cooking process anymore where the steam is getting up into the atmosphere and you can smell that yeasty, oatmeal, whatever you're calling it smell; this is a tank; these are enclosed tanks, going into enclosed trucks, using enclosed tubing and if there was an event of a spill, which in the six years we've been here, I think we've had two small spills to the equivalent of 50 gallons at a clip; maybe a valve broke; immediately reported to DNREC; immediately cleaned up; immediately put lime on it for neutralization of odor and smell on the ground; much like you would a spill of oil you might put kitty litter on to try to contain it immediately. Those are the rules we live by. We have every two weeks reporting requirements to DNREC; they visit us at least once a month for in person visits; they visit the sites where we apply our process; we are heavily regulated by DNREC; this isn't a well that's just a nuisance complaint; DNREC takes that part very seriously, much like you've received a number of complaints related to noise. We've gone above and beyond on noise, showing our ability to be a good neighbor in putting in a lot of noise control efforts, well above what Planning & Zoning requirements would be, because we wanted to demonstrate that help to save Robin and his team from having to go out there 75 times a month with a noise meter just to prove that we weren't violating anything. Odor is the exact same thing. It's what we're doing today, it's what we've been doing for six years now; if this was a new thing I can see a cause for concern or alarm, because well it's the unexpected, well what do we know, we have to go on their promise; this is something we've been doing for six and a half years. It's the same thing that we've been doing for six and a half years and it's not going to change; and I don't know how else to convince you that the DNREC approval, I think it's called the Operations Manual, whatever that official word was for the Operations Manual, was not a condition for preliminary, which was why Bob Kerr did not have it as part of preliminary; it was a condition after preliminary, which we've met. In there it says, that if there is any issue they will come to us and force us to take matters into our own hands; they'll force us to lime farm fields if the Ph is getting out of whack; they'll force us to address nitrate levels on the soils; they heavily regulate every aspect of what we do; and have.

Virginia Weeks: On the Procedure Manual there was a discussion on odor; the answer from Mr. Moore from Becker Morgan Group was that he would supply, for Bob's perusal, the Operation of Maintenance Procedure Manual.

Nick Benz: And we did that already.

Virginia Weeks: Right. That gave Bob a chance to review it; and Bob reviewed it and suggested, he says, it is recommended that a note be considered as follows. Was he not satisfied?

Nick Benz: And you're considering it.

Virginia Weeks: That's my question.

Nick Benz: My problem is you're potentially going down the path of saying Dog Fish you must put on odor control equipment; spend resources and money for something that hypothetically may happen; when the DNREC provisions clearly cover the situation where, if it happens, we'll be required to do so. It's no different than any other requirement in that DNREC Manual.

Ted Kanakos: The Town is taking a position. We would like this problem to be resolved at the Town level, before DNREC. He says, the owner or operator shall be responsible for adding odor control equipment, etc. should the Town receive odor complaints from nearby residents.

Virginia Weeks: And the Town determines that the odors are from wastewater storage tanks or containment pond.

Gene Steele: How is the Town going to know what the rates are, without going to DNREC, because DNREC has the equipment. We do not have the equipment, the odors, or whatever.

Ted Kanakos: The Town may have to buy one, like they bought a sound meter; they may rent one; they may hire an engineer to do this.

Virginia Weeks: Listen, we could go on this all night and there's no sense in it, because it's not getting answered.

Nick Benz: I would like to make one final point which is, and I believe I addressed this at preliminary. These are not storage tanks; these are pass-through tanks; these are tanks; we generate about 30 to 35,000 gallons per day of wastewater that must be land applied...

Virginia Weeks: And you do an admirable job.

Nick Benz: But my point is with the storage we have on sight, Bob Kerr's fear is that, I'm assuming his fear, is that beer sits in a tank for 6 weeks, doesn't move, just sits there and becomes like a festering pool of water in a swamp; it's that sulphury smell; you don't get that sulphury smell off of a river, because you have pass-through of the water. There's no stagnation; there's no build of microbiological matter; there's no build of mold; and bacteria and all the things that would make those odors. This is a pass-through event and it happens so quickly; these tanks turnover complete volumes within a two day period which is way further in advance then you have the ability to even generate odors.

Virginia Weeks: How often is the tank cleaned?

Nick Benz: The tank is constantly in use. So it rolls through in the process of always fresh stuff hitting it, there is no cleaning process, there's no cleaning process unless there is a reason to clean it; if there's a reason to clean it, something else has happened that DNREC has forced us to do that. We've never had to clean the tanks in six and a half years since we've been there.

The existing tanks that we currently have; and there's never been an odor complaint at our facility in six and a half years.

Virginia Weeks: I suppose that if it became a nuisance the Town would go to DNREC. Does anybody else have anything that they want to say? Do we have a motion? A yea or nay table, whatever you want. Make a motion. There's one other thing I wanted to ask you, Mr. Benz. You gave a testimony in the Preliminary that the trucks would be starting a lot later than 5:30 in the morning; what time will the trucks be starting?

Nick Benz: I don't know the exact answer to that. If I had to guess, I would say between 7 and 8 a.m. and the intent is with enough storage on site, for the next foreseeable future, probably the next two years at least, we wouldn't need to run on Saturdays either, which was also a benefit.

Virginia Weeks: It was the 5:30 in the morning; so 7:00 a.m. is what you're saying.

Nick Benz: And in Cabe's letter, I actually made an assumption, but it actually says quite specifically the new tank may result in on-site storage of wastewater for greater lengths of time. Because we can't and have never been permitted since we got kicked off the system to send one drop of liquid to the Town, we are not going to stop our production; so in order to keep our production moving, we have to flow through 35,000 gallons per day, through these tanks, to the farm fields for irrigation, there is no such thing as storage for greater lengths of time; or else we're affecting our revenue stream and our ability to exist as a business.

Virginia Weeks: Can I have a motion, please.

Ted Kanakos: I make a motion that we approve the Final Site Plan for Dog Fish Properties, the Applicant, requesting the Final Site Plan Approval for the installation of processed wastewater storage tank located at 6 The Center, further identified by Sussex County Tax Map and Parcel Number 2-35-20.11-52.01 and 52.06.

Virginia Weeks: I would like to add something to that. Mary, since testimony was given at Preliminary that trucks would no longer be there at 5:30 in the morning can we put that in?

Mary Schrider-Fox: That would not be appropriate.

Virginia Weeks: Can I have a second to that motion?

Al Perkins: I would like to second the motion that was just made.

Virginia Weeks: Voice vote:

Al Perkins	Yes
Ted Kanakos	Yes
Gene Steele	Yes
Ed Kost	Yes
Dick Grieg	Yes
Virginia Weeks	Yes

- Robin Davis: Mrs. Weeks asked about the parking lot that was approved by Planning & Zoning for the Milton Elementary School down on Federal Street.

Through the Mayor I got an email that I guess Mrs. Weeks has requested it of the Mayor that in turn gave it to the Town Manager and in turn forwarded it to me, to go out and do an inspection of the parking lot. I did the inspection of the parking lot; there are several issues that weren't done from the approved plan; curb stops; there's a stop sign missing; a do not enter sign missing; some things like that. I contacted the engineer, Edwin Tennefoss, talked to him and he was under the assumption that it was all done; he didn't actually do the work; they had a contractor, EDIS, I think that did the work. What I have done is send a letter to the school and copied Edwin on it; because Edwin said he would make sure that those issues got taken care of. He said he would work with the contractor and the school; but he thought that since the Applicant was the school, the school should get the letter and he would just get copied; he would work with Mr. Woodyard of the school to make sure all these issues were taken care of.

Ted Kanakos: Robin, I have a question. Did these little items, as far as the curb steps and whatever, is the actual layout and design of where the parking spots are, the traffic flow in and traffic flow out, has that been accomplished according to the Plan?

Robin Davis: Yes. They have a two way into the parking lot, an in and an out into the parking lot and then there is only a one-way going past it to going behind the school; that's how I can explain it; that's why the do not enter signs were supposed to be put up and they have not been put up.

Ted Kanakos: So they can go behind the school.

Robin Davis: They are not actually supposed to come in that way; you're only supposed to have access to that parking lot from the new entrance; then you're supposed to stop; you're not supposed to have access to behind the school; that's supposed to be from the old entrance.

Virginia Weeks: The other thing was I think this parking lot was represented to us as a necessity for the drop-off and pick-up of children and in affect it is actually the only parking lot.

Robin Davis: They still have a parking lot in the back, still. There is some parking in the back, very, very minor.

Ted Kanakos: It's not for pick up.

Virginia Weeks: There's no sign that says it is for drop-off and pick-up only.

Robin Davis: No, there was no requirement that says that. That's just what they said.

Virginia Weeks: That's what we were told it was for.

Robin Davis: That's what we were told, but I don't know unless somebody stands out there.

Virginia Weeks: There are no available spots for anybody to drop off their kids.

Robin Davis: There are some there in the back, but that's it. The school is being notified that there are some issues that need to be addressed and be corrected.

Virginia Weeks: Thank you. Robin went out and measured and there's enough space.

- Virginia Weeks: The other thing, Robin, was you were going to work on something about the problem we have when an Applicant mentions something, us having to write down every specific thing, such as, it would be later than 5:30 in the morning and so on and if we don't put it in the motion, supposedly, they can't be held to that. How are we going to get around that?

Mary Schrider-Fox: Well, you don't get around it. There are two issues and that is how would be the best way, what are your options to make a motion, any kind of motion and whether it be a Preliminary Site Plan Approval or some other type of approval. If you're talking about Preliminary Site Plan Approval if you capture certain conditions of the Preliminary Site Plan Approval stage and then later at the Final Approval stage you come up with different ones, you just can't do that, that's just the way it works.

Ted Kanakos: That's what happened tonight.

Virginia Weeks: We agree with that.

Mary Schrider-Fox: I'm saying that they are different things actually. One is a process issue that you have under your Ordinances of what they say you can and can't do at this stage vs. a later stage. When it comes to making the motion, there's one way to do it, which is, okay I'll stop.

Ed Kost: I have a question, as per \_\_\_\_ discussion, do we stop and say, this is an important point and make sure everybody agrees this is an important point; make note of it so we get to the motion we can include it? If you're in the middle of a discussion and you're following through, to know that you just hit something that we need to include in the motion, can we stop all the members and say, yes, this is important and we're going to include this when we get around to the motion. Can we do that?

Mary Schrider-Fox: Certainly.

Virginia Weeks: For example, we have a Preliminary Site Plan and somebody says let's take Pret Dyer up here with Dr. White's property and he says we're going to put in 800 trees and we're going to give 200 more to the Town. If we don't put that in our motion, he can't be held to that. That seems that we have to go down to the miniscule of things, not that 1,000 trees is miniscule, but every little thing he promises; if we don't put it in our motion; every little thing he represents to us, we can't hold him to it.

Dick Grieg: Is there any way that we can make them an agreement that if it is in the minutes, they must abide by that?

Debbie Pfiel: If I can interject, some of the things that are discussed other regulatory agencies may change. For example, if somebody says they are going to keep 800 trees and when they go to DNREC maybe those trees were in the wetland delineation and DNREC had to move them. So what we have found in the past, and it's costing the Town money and time and some concerns on what should be placed on the Plan when we come back, is if it in the motion, at the end, which can be long, sometimes your minutes are 50 pages and it's up to us for us to go through and say did everybody agree or is this something just Mrs. Weeks wants or just Mr. Kanakos wants or etc., did everybody agree and when you do a poll vote, in Robert's Rules of Order, it

needs to be a motion anyway. Somebody can keep a tab, I think you used to do that, I believe you used to do that, keep a tab for when the motion came, it was very inclusive.

Ed Kost: When you're having a discussion, you're just flowing. If it just flows through, there's no way to tell.

Ted Kanakos: If someone keeps these taking these little notes and at the end reads all the notes off and says shall these all be included in? As far as trees or somebody else superseding our decision, that's fine. If that's the case. If he promises 800 trees and he doesn't know he can't promise 800 trees, I'll give him the benefit of the doubt, if there's a legitimate reason why he only comes up with 300 trees; but you know they've been blowing smoke up our nose for lots of things, we're going to do this, the lighting is going to be great; we're going to do this and that; then you turn around and it's a barren deal and they haven't done anything; and since we didn't get to it on the Preliminary, and now at the Final you still can't do anything; we ran into this little bit right here. I think what we have to do, and it would be a good idea, is to note on a regular basis throughout, these are the same things that can be plucked out of the minutes later on; but I think we have to hold these folks to everything that they've promised and then everything that we've asked them for, that they agree on.

Debbie Pfiel: Correct. There's not a question there, we agree with you 100%. The problem is when you go through your minutes, because these are longer meetings than the other meetings that we hold, you have a 50 page meeting and we don't know until that motion, truly, what we have to enforce to them and that has been reviewed by the lawyer, by myself, by Bob and Robin and between the four of us, we can come up with different ideas. It's the motion list, if we can give that to them vs. the interpretation of who wants what. I think the note thing is a really good idea; my recommendation would be before you call for a motion, you can ask for ideas and comments like you have discussion, before you have the motion and everybody would be able to say what they would like to see in a motion and somebody would take the motion from there.

Ted Kanakos: We did that partially one time, I remember.

Debbie Pfiel: It worked out really well when you did it before.

Ted Kanakos: We said everyone included in and I remember you had helped with that.

Mary Schrider-Fox: Right and here's another idea; the only other idea I could think of; then it creates a little bit of a delay for the Applicant. And that is you close your record and your table your decision until next time and in the meantime you review the tapes and you review the minutes and everybody sits there and you craft the seemingly perfect motion before you get to the next meeting. That is a way that you can do it; you table your decision. If that becomes part of your standard routine, Applicants might not be happy, because I know I'll have to wait until next time to get my decision; but that's one way.

Ed Kost: Are we getting any time constraints where we have to act within so many days?

Mary Schrider-Fox: You can certainly table a decision until next time and then after you've deliberated, you have a certain period of time; it depends on what kind of applications before you of how much time you have to act in; but if you table it that means you are deferring your decision until next time and officially the matter's not closed; it's not done yet to trigger your time period. I think you could operate that way, if you wanted to.

Ted Kanakos: In all the time I've been on the Board, there hasn't been any project that has been so imperative that it started right away. They waited six months before they asked for extensions. Some have asked for extensions three times.

Gene Steele: A year later they started.

Virginia Weeks: We're told we have to give it to them now.

Ted Kanakos: Then all of a sudden there has to be a motion. I have no problem with the idea of tabling something.

Mary Schrider-Fox: I need to correct something I just said a minute ago. Robin just pointed out to me that when it comes to the Preliminary Site Plan, the way that the Ordinance is currently worded, is it says that within thirty days of the public hearing; so unfortunately if we bifurcate our deliberation from the public hearing, we have to make sure that our next meeting is within the thirty day time period.

Gene Steele: How about if we just take a twenty minute recess? They leave and we discuss it right then and there.

Mary Schrider-Fox: Or they can stick around.

Virginia Weeks: No.

Mary Schrider-Fox: Well, the deliberation and the decision making process needs to be public, but there's another thing everybody needs to remember and this is at all levels; whether it's the Board of Adjustment, Town Council, there's a sense of urgency; because people are sitting there and staring at you; I certainly understand that you sit there and you think, okay I have to be quick; we have to be on this and we have to say it quickly. If everybody wants to sit there and take ten minutes and not say a word and read through the information that you have; and think of a list; and for ten minutes everybody's just sitting there silently; staring at you or twiddling their thumbs; that's perfectly acceptable. Take your time. You don't need to rush through it. Debbie was just saying motions shouldn't be the fastest part.

Ted Kanakos: Maybe we can come up with a form.

Mary Schrider-Fox: You certainly can.

Virginia Weeks: I had worked at one time and it doesn't need to be done, but a checklist and whoever is keeping it street frontage; what he says about setbacks and buffers; what he says about parking; and you can just write it down.

Ed Kost: The problem is if someone says we need 50 trees; if this whole group doesn't agree to 50 trees...

Virginia Weeks: No, but we can put it into the motion.



Ed Kost: Yes, but what I'm saying is when someone says we should have 50 trees, then I want this group to say, gee, let's poll; does everyone agree with 50 trees; and I'll make a note for 50 trees. I'm not going to sit here and have line after line of notes; if that's what you expect from me, you're not going to get it.

Debbie Pfiel: If I can clarify, remember that your motion is only things above and beyond what the Plan is already got on it. So if the Plan has something on it, you're approving the Plan; if you want something above and beyond the Plan or a correction, that's in the motion. The motion doesn't have to say you have 52 parking spaces; the zoning is R-1. That's already on this Plan that we're working with. It's addition to; so it will be corrections, additions or things that you want removed. So it doesn't have to be anything relating to that paper Plan that you feel comfortable with; that's already on record.

Ted Kanakos: So if they feel that they have to sweeten the pot; we can write that down.

Debbie Pfiel: You can say add, delete, remove or however you want to go down. Like with your list; but if you're going to say this has 16 parking spaces and there are 52 trees showing, we want to make sure there are 52; you do not have to rehash the Plan itself; that is in the record.

Ed Kost: What I'm talking about is additional comments, ideas that we should include. When she first brought up the point, she made note of it so when we get the motion we can go back and discuss it.

Ted Kanakos: Basically, it's what they're offering is what we want copied right now.

Ed Kost: I don't care what... we think they should give it to us.

Debbie Pfiel: I agree with Ted.

Dick Grieg: They know when they butter the plate, we say yes, okay and it's not in the motion. They know that they're...

Debbie Pfiel: What you can get, in one of our jurisdictions we had some issues that we worked through; we've been doing it for a year; what they did was everybody wrote their list of what was important to them; as you're going through the meeting. Everybody has their own issue; their own thing that they want; that they are concerned about on this Plan, that is different then the four other members. So we have everybody writing down their list of what's important to them. Then, before you say I'd like to enter a motion; let's have discussion about the Plan; you can go through your list and say okay who wants to make a motion based on everything we've heard. So you can consider a motion; you can table a motion; you can override a motion; you can discuss it; but you would have this list that everybody has and then whoever makes the motion would consider what everybody wanted.

Dick Grieg: We could have a form set up for Final Motion.

Debbie Pfiel: Correct.

Dick Grieg: Just say Ed this and this. We agree and disagree and then we'll all be on one form.

Ted Kanakos: We've done that before.

Debbie Pfiel: It worked well for Ted, we just don't have to get into what's on the Plan and reiterate it again.

Virginia Weeks: The other thing that has to happen, also, we have been told, is that when the Town Council approves something that we have approved, such as a sub-division, or the Food Lion Plaza, for example; there were things in their preliminary before any of us were on this Board that they offered to do and when the Town Council approved it, they said and we approve it per the requirements by the Planning & Zoning Commission. We were told that was not good enough; that they have to enumerate all the things that we have enumerated. Otherwise they can't be held to it.

Debbie Pfiel: The problem you have when a Council rubberstamps minutes, they can rubberstamp the minutes of the Planning Commission, but the true vote on how the Planning Commission minutes get approved, are by the body that attended the meeting; so you approve Planning Commission meeting minutes, because you attended that meeting; not the Town Council. The Town Council will have a recommendation; and I can say procedurally, I think things were done wrong a little bit, because on the sub-division agreement, on an annexation agreement, all these items get worked out to be able to incorporate them into your Plan. I think we can talk to you all night about what was done in the past; but I think what we're bringing to light is the frustration that we're having in the minutes and you're having in your motions; and I recommend just so you don't have to be here until 10 tonight that you go with your list recommendation and try that at your next meeting.

Virginia Weeks: Exactly, I just want to make sure that if we do it when it goes to the Town Council, they don't undo what we've done.

Debbie Pfiel: The Town Council has the right to undo what the Planning & Zoning Commission does; you're a recommending Board.

Virginia Weeks: But if they just say...

Ted Kanakos: On a line item, on an individual item.

Virginia Weeks: No absolutely; but if they did say we agree with the recommendations of the Planning & Zoning, is that good enough? Or do they have to list all of the things in our motion?

Debbie Pfiel: The Planning Commission motion would go with Town Council Minutes.

Virginia Weeks: Okay, so it's good enough, so what we were told before is out the window.

Mary Schrider-Fox: I think what Debbie was trying to emphasize is you guys don't have any control of what happens when something leaves here; after you make your decision; I think the best that you can do is try to make your decision as clear and concise as possible and if it ends up at Town Council and things get undone, that's not your fault; I know that it concerns you; but, that can't dictate how you proceed here. That's a different ball of wax.

Virginia Weeks: I'm not asking that it dictate how we proceed here, I'm just saying that when it gets over there, that they are instructed that they have to do such and such.

Mary Schrider-Fox: We can instruct all day long and that doesn't mean anybody and everybody will listen to us. That's here, there and everywhere. That's all I can tell you.

Ed Kost: When we approve something and the next day or so I write a memo, I give it to Robin, saying this is what we approved; and here's the conditions. I give all you guys copies of it; you've seen that. Does that actually go to Council? Do they see that?

Mary Schrider-Fox: Yes.

Ed Kost: The actual what I gave you actually goes to Council; so what I give them is a complete, accurate to reflect whatever we really want; whether they approve it or not, that's irrelevant.

Mary Schrider-Fox: Yes, that is part of their monthly packet, every single month at the Town Council Meetings.

- Virginia Weeks: Onto the next subject. Debbie would you explain to the Planning & Zoning Commission, the process of the Comp Plan, that it's going to go through.

Debbie Pfiel: At this time, I would like to ask Mrs. Weeks if you would like me to speak on the Comp Plan. I feel that you have a potential FOIA violation, because it wasn't advertised; it is not an emergency item and it is supposed to be placed on your next Planning Commission Agenda per the Council.

Virginia Weeks: Well.

Debbie Pfiel: I'm just advising you, I'm asking you if you wanted me to proceed now.

Mary Schrider-Fox: I'll way in on that, that generally when it comes to adding new items of business that FOIA does allow for additional items to arise at the time of the meeting. My very strong feeling is that this probably was not an item that just arose at the time of this meeting. Ms. Weeks, I know that you've been aware of it as an issue.

Virginia Weeks: It had not arisen before this meeting. It arose at the last Council meeting and this is the first meeting after that Council meeting.

Mary Schrider-Fox: Right, but what I just need to point out from a legal perspective, this could potentially; if somebody wanted to complain and say you guys talked about something and amended the Agenda and it didn't squarely fit under FOIA Amendment Requirements, that you have to give your seven days notice.

Virginia Weeks: I have to get a FOIA request then to discuss it.

Ted Kanakos: Or put it on the Agenda

Virginia Weeks: I adjourn this meeting.

Mary Schrider-Fox: You're getting upset because we're giving you some legal advice about this.

Virginia Weeks: Just a moment, the schedule that I saw for the Comp Plan shows that all of this is going to be done and written, without any public input.

Debbie Pfiel: That is incorrect.

Virginia Weeks: The schedule does not allow for any public input until January.

Debbie Pfiel: Mrs. Weeks, if we can, we are advising you that there is a potential FOIA violation; we're letting you know legally that we could possibly be in a situation legally. I'm letting you know, because I want my company protected from this client doing something that can potentially harm our legal status. So, what I'm letting you know is Council on the schedule adopted this schedule; adopted a scope and it is on your next Council Agenda; that's what we got from the Town Council; who have given us the direction to move forward. Robin has gotten the direction to put it on the next Planning Commission Agenda and that's when we will be discussing it in detail.

Virginia Weeks: Just answer a question. When is the public going to have some to say about this?

Debbie Pfiel: There is a required public hearing and a conference in the Plan process. We will be discussing this at your next meeting.

Virginia Weeks: When will that occur?

Debbie Pfiel: Mrs. Weeks, I don't feel comfortable discussing this.

Virginia Weeks: We were all given copies of that schedule. We don't have to get it from FOIA. We were given copies of it.

Debbie Pfiel: Correct. It is on your next Agenda per the Town Council of Milton. Thank you.

Virginia Weeks: I am going to report to the Mayor and Town Council that we were prohibited from speaking about it and we were told we would need a FOIA request.

Debbie Pfiel: Not a FOIA request.

Virginia Weeks: Is that what we were told?

Mary Schrider-Fox: That's not accurate and I want to go ahead and place on the record that that is not what I said.

Virginia Weeks: Why can't we discuss it?

Mary Schrider-Fox: Ms. Weeks, first of all, please calm down for a second because you interrupted me before when I was trying to explain. It's my job to try to give legal advice to this Commission; you can take it or leave it. It's been taken and it's been left in other situations. So, all I can do is advise you that by amending the Agenda to include new Agenda items that did not arise at the time of this meeting, in the nature of an emergency, that there's no urgency with respect to the issue that's being discussed, that would disallow us from waiting until a properly scheduled and noticed meeting; that could open the Town up to a FOIA violation complaint. When that happens, somebody makes a FOIA violation complaint to the AG's office; the AG's office sends me a letter and says, what happened at this meeting? Do you have a FOIA violation? I try to defend the Town in it and possibly the AG could say, you know what, I'm going to Ding you, that was a FOIA violation; publish an opinion about that; and then make us take some sort of remedial action in order to fix the technical error that we committed because we didn't properly notice a meeting. That's just the process. I'm not telling you that you're wrong to want to talk about it; I'm not telling you that you're not

allowed to talk about; I'm telling you from a legal perspective that there could be consequences if we don't notice an agenda exactly the right way; don't amend it exactly the right way. That's all I'm telling you. And if you report to somebody that you're prohibited from talking about this and you've been told you have to submit a FOIA request that is completely not what I said. If you want to request documents from the Town about any particular item, then you should submit a FOIA request. That's not what I'm talking about.

Virginia Weeks: It was my understanding previously at other meetings we had been able to add discussions.

Mary Schrider-Fox: You're safer and more insulated from challenge if you're not taking action on an item and you're just trying to gather information, but, nevertheless, I have to try to do my job, so that's why I've made the disclosure that I've made to you and that's the best that I can do.

## 7. Adjournment

Virginia Weeks: We need a motion to adjourn.

Ted Kanakos: I make a motion to adjourn.

Gene Steele: Second.

Virginia Weeks: Voice vote; all in favor say "Aye". Meeting adjourned at 8:09 p.m.